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No. 92-1818

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

FRANCES NICHOLS and DAVID NICHOLS

Petitioners

VERSUS

GRAYDEN TUBB, M.D., TOM MCDONALD, M.D. and NORTH MISSISSIPPI MEDICAL CENTER,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENT GRAYDEN TUBB, M.D.

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the first or fourteenth amendments to The United States Constitution requires the unrestricted ability to interview jurors post-verdict even in the absence of a threshold showing of good cause to believe that the jury was subjected to extraneous information.

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GRAYDEN TUBB, M.D., TOM MCDONALD, M.D. and NORTH MISSISSIPPI MEDICAL CENTER,

Respondents

Respondent Grayden Tubb, M.D. respectfully requests that this Court deny the Petition for Writ of Certiorari to review the decision of the Mississippi Supreme Court denying petitioner's Motion for Extraordinary Relief and Motion for Rehearing thereof.

OPINIONS AND ORDERS BELOW

Petitioners neglect to cite the August 1, 1990 decision of the Mississippi Supreme Court denying petitioners' "Statement of Facts", treated as a Petition for Extraordinary Relief pursuant to Mississippi Supreme Court Rule 21. The decision is unreported and is reproduced in

App. A, 1a-2a attached to Respondent North Mississippi Medical Center's Brief in Opposition to the Petition for Writ of Certiorari.

JURISDICTION

The Petition for Writ of Certiorari herein wholly fails to provide a jurisdictional statement showing the dates of the judgment or decree sought to be reviewed in accordance with Rule 14.1 (e) (i) & (ii), Rules of the Supreme Court of the United States. A chronology of the dates of the judgments, orders and opinions involved herein reveals that this court has no jurisdiction under 28 USC § 1257 to review any decision of the Mississippi Supreme Court for constitutional infirmities.

Petitioners now complain that their inability to interview jurors in furtherance of their motion for a new trial violated their constitutional rights of free speech and due process under the first and fourteenth amendments, respectively. However, in their

direct appeal to the Mississippi Supreme Court of the adverse jury verdict petitioners did not raise any issue of extraneous influence on the jury or the trial court's denial of their motion to interview jurors. Rather, after briefing of the direct appeal was completed and the case was submitted to the Mississippi Supreme Court for decision, petitioners raised the claim of alleged extraneous influence on the jury and asserted error by the trial court in not permitting further juror interviews by way of a filing with the Mississippi Supreme Court on 22 November 1989 which was treated as a Petition for Extraordinary Relief, under Rule 21, Mississippi Supreme Court Rules. Even in this filing petitioners did not raise the instant speech and due process claims under the first and fourteenth amendments. The Mississippi Supreme Court denied relief on this petition on August 1, 1990 and petitioners did not seek a timely rehearing pursuant to Rule 40, Mississippi Supreme Court Rules. On August 19,

1992 the Mississippi Supreme Court issued its decision on the direct appeal affirming the judgment of the Circuit Court of Lee County, Mississippi. Thereafter, petitioners sought a rehearing of the decision and in a supplement raised for the first time the federal claims upon which review is now sought. The Mississippi Supreme Court denied rehearing on December 31, 1992.

The decision of the Mississippi Supreme Court regarding any issue of extraneous influence on the jury or the petitioners ability to interview jurors was final August 1, 1990. Hence, the instant Petition for Writ of Certiorari is untimely under 28 USC § 2101 (c). Furthermore, untimely raising the federal constitutional claims for the first time on petition for rehearing did not preserve the claims under 28 USC § 1257.

STATEMENT OF THE CASE

Respondent Dr. Tubb respectfully disputes

the accuracy of the Statement of the Case set forth by petitioners herein. Respondent Dr. Tubb will adopt by reference the Statement of the Case set forth in North Mississippi Medical Center's Brief in Opposition with the following highlights and additions.

Contrary to petitioner's statement they have never presented any information to substantiate any claim that the jury in this case was subjected to extraneous influence. After petitioners' counsel had twice violated a court order not to unilaterally contact jurors without first obtaining permission from the court, petitioners were presented with a hearing opportunity to make a showing that there was good cause to believe that the jury was subjected to extraneous influence prior to reaching its verdict. Following this hearing opportunity the trial court concluded that there was no cause to believe that any juror was subjected to extraneous influence and that there was no justification to subject any juror to

further interrogation. Contrary to petitioners' statement Dr. Gary did not substantiate that alternative juror Denham (erroneously referred to as "Denna") related to him (Gary) information indicating that the jury had received adverse information about plaintiff from outside sources prior to reaching its verdict. (Petition for Writ of Certiorari, p.2). Rather, Dr. Gary merely offered by way of affidavit that two (2) days after the jury had reached its verdict an alternate juror (who was excused prior to the jury retiring to deliberate its verdict) was then aware that Mrs. Nichols was receiving workers' compensation benefits. Dr. Gary's affidavit expressly disclaims any claim that Ms. Denham learned of information regarding workers' compensation while she was still serving as a juror and it in no way implies that any juror who deliberated and reached a verdict was subjected to any extraneous information. Moreover, petitioners wholly failed to mention that their counsel questioned another juror

(Chester Stasko) in violation of the court's order against contacting jurors. Petitioners' counsel secretly recorded his questioning of juror Stasko, and at the direction of the trial court a transcript of this recording was made and considered by the court in ruling on petitioners' motion to further interview jurors. Petitioners' counsel employed guile and cunning in an effort to induce juror Stasko to impeach his verdict, but Mr. Stasko remained resolute that the jury was not subjected to extraneous information before reaching its verdict, and that it was only after the jury had published its verdict and had been discharged did he learn that Mrs. Nichols was receiving workers' compensation benefits.

It is inaccurate for petitioners to imply that they ever presented the affidavit of discharged juror Clinton Hill to the trial court in support of their motion to interview jurors or motion for a new trial. The Hill affidavit was first presented in support of petitioners'

filing in the Mississippi Supreme Court which was treated as a Petition for Extraordinary Relief. Still the Hill affidavit discloses no source of outside information and is strictly confined to internal discussions among jurors.

It is further inaccurate for petitioners to claim that information concerning insurance benefits was foreign to the record. It was the petitioners themselves who interjected into the record before the jury the fact that Mrs. Nichols was receiving insurance benefits and that her medical expenses were "$7,000.00 per month".

It is also inaccurate for petitioners to claim support in the record that a settlement offer in any amount was made by any respondent.

Petitioners' statement of the case further fails to state that in neither their motion to interview jurors or for a new trial before the trial court, nor their direct appeal to the Mississippi Supreme Court, nor their separate filing in the Mississippi Supreme Court treated

as a Petition for Extraordinary Relief did they raise the federal constitutional claims now raised. Were petitioners to make the required candid statement required by Rule 14.1 (h), Rules of the Supreme Court of the United States as to when they first raised the federal question sought to be reviewed, it would be apparent that the claimed federal constitutional right to interview jurors under the first and fourteenth amendments was only first raised on petition for rehearing on direct appeal, after the matter of alleged improper influence on the jury was separately and finally concluded in a collateral appeal.

REASONS FOR DENYING THE WRIT

A. The Petition for Writ of Certiorari is untimely and the federal claims were not properly raised and preserved in the state courts below.

Respondent Dr. Tubb respectfully adopts by reference the argument made by respondent North

Mississippi Medical Center on these points.

B. The Petition for Writ of Certiorari is without merit.

The instant petition does not present any compelling reason for the allowance of a writ as outlined in Rule 10, Rules of the Supreme Court of the United States. The issue which the petitioners hold up for review is whether the constitutional guarantees of free speech and due process require that a litigant be allowed to interview jurors in furtherance of a motion for new trial. However, petitioners can not demonstrate that the proceeding which was followed in this case in any way conflicts with the decisions of any other court as to what is required by the United States Constitution under the circumstances. What the petitioners are reduced to arguing under the circumstances is the claim "that there is a diversity of opinion among the lower courts on the issue of (the) propriety of attorney contact with jurors post-verdict". (Petition p.6) Regardless of the

soundness of such claim, such does not amount to a conflict of authority as to what is constitutionally required. Furthermore, it can hardly be claimed that the proceedings followed in this case either conflicts with a decision of this Court or raises an important federal question which has not been settled by this Court. This Court's decisions in *Smith v. Phillips*, 455 US 209, 71 L Ed. 2d 78, 102 S.Ct. 940 (1982) and *Tanner v. United States* 483 US 107, 97 L Ed. 2d 90, 107 S.Ct. 2739 (1987) certainly do not require that a party be allowed to interview jurors any time there are unsubstantiated suppositions that a juror may have been subjected to extraneous information. Moreover, no decision of this court forecloses the requirement followed by the trial court in this case that a party must demonstrate a reasonable basis to believe that a juror was subjected to extraneous influence before permitting interrogation of jurors. Indeed, the decision in *Tanner* would clearly appear to

approve of such a supervisory procedure by a trial court. 483 US at 126, 97 L Ed. 2d at 109-110 (affidavit from juror submitted in support of new trial and obtained in violation of trial court's order and local rule against juror interviews would have been properly disregarded by court).

Contrary to petitioners' claim the proceedings followed by the trial court in this case are consistent with the procedures long recognized as necessary to protect the integrity of jury verdicts.

Mississippi law is in accordance with federal law in prohibiting jurors from being called as witnesses to testify concerning the internal discussions among the jury. *Salter v. Watkins*, 513 So2d 569, 571 n.1. (Miss. 1987) (Rule 606 (b), Mississippi Rules of Evidence modeled on Rule 606 (b) Federal Rule of Evidence, citing *Tanner supra)*; and Mississippi law has long recognized the policy concerns and necessity of zealously guarding against

subjecting jurors to post-verdict inquiry. *Pan American Petroleum Corp. v. Pate* 128 So 870 (Miss. 1930) (refusal to allow party to question juror even on subject of extraneous information where party can not first lay predicate of specific basis to believe such extraneous information was conveyed to jury) *Planters Wholesale Grocery v. Kincade* 50 So2d 57 (Miss. 1951) (allowing jury to impeach verdict would only encourage jury tampering).

Thus, Mississippi law is consistent with the general rule that post-verdict interrogation of jurors is not favored and should be closely controlled by the court. It is well to note here that the ability to question jurors was not absolutely foreclosed. The Court merely required that the petitioners make a specific showing of good cause to believe that extraneous influence reached the jury. The petitioners were provided with a hearing at which they had the opportunity to make such a showing of good cause. In the exercise of sound discretion the

trial court simply found that there was no evidence that the jury was subjected to extraneous influence, and thus, no justification to allow further interrogation of jurors. *O'Rear v. Fruehauf Corp.* 554 Fed. 1304, 1309-10 (5th Circuit 1976) (requiring a showing of "specific instances of misconduct" before allowing the parties to conduct juror interrogation); *Bolton v. Tesoro Petroleum Corp.* 871 F2d 1266 (5th cir.), *cert den* 493 US 823, 107 L Ed. 2d 49, 110 S. Ct. 83 (1989) (how best to gather information regarding alleged jury misconduct is a matter of trial court discretion); *Big John B.V. v. Indian Head Grain Co.* 718 F2d 143, 150 (5th Cir. 1983) (interrogation of jurors prohibited without preliminary showing of likelihood of specific instances of juror misconduct); *Continental Cas. Co. v. Howard* 775 F2d 876, 886 (7th cir. 1985) cert den. 475 US 1122, 90 L Ed. 2d 186, 106 S. Ct. 1641 (1985) (Same), *United States v. Gravely* 840 F2d 1156, 1159 (4th Cir. 1988) (Same); *United States v. Bruscino* 687 F2d 938, 941 (7th

Cir. 1902) cert den 459 US 1211, 75 L Ed. 2d 446, 103 S. Ct. 1205 (trial court can rely on its own familiarity with the proceedings when deciding whether a verdict was affected by outside influence.)

Here the petitioners' real complaint is the claim that they made a sufficient showing to justify being allowed to question other jurors. This merely amounts to a claim that the trial court abused its discretion in concluding otherwise. This is not the stuff of a constitutional claim.

CONCLUSION

Respondent Grayden Tubb, M.D. respectfully submits that the Petition for Writ of Certiorari should be denied. The federal claims presented for review by this court are untimely and were not properly raised and preserved in the state courts below. Moreover, the Petition is without substantive merit. The proceedings followed by the trial court in disposing of the petitioners'

motion to further interview jurors was in accordance with well recognized policy considerations and involved the exercise of discretion by the trial court. Neither the first nor the fourteenth amendments required the trial court to act other then it did.

Respectfully submitted

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